No. 2949

No. 14,872

United States Court of Appeals
For the Ninth Circuit

HARMON M. WALEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the Western District of Washington, Southern Division. Honorable George H. Boldt, Judge.

APPELLANT'S BRIEF.

HARMON M. WALEY,
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Appellant Pro Se.

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APPELLANT'S BRIEF.

Comes appellant, Harmon M. Waley, on appeal from the United States District Court for the Western District of Washington, Southern Division, as provided by 28 U.S.C.A. 2255, law, and make following summary of case.

SUMMARY OF FACTS.

Appellant introduced motion into above said Court under 28 U.S.C.A. 2255, moving Court to set aside conviction, judgment, sentence, and commitment in case 14,852, U. S. v. Waley, and bring him into Court

for proper trial by jury, which right Amendment Six, United States Constitution, affords him, and having deprived him of such right.

On June 15, 1955, without a hearing being held upon matters of fact involved, upon a basis of law alone, trial Court denied motion said.

As trial Court record discloses, rather only a proper hearing would disclose, that on June 20, 1935, my wife then asked me to ask the trial Court about the indictment, which such Court declined to answer; whereupon, Mr. Hughes, Assistant United States Attorney, advised appellant that one Stephen J. O'Brien, Esq., was there from Mr. John Dore's office in Seattle, Washington, to represent appellant's wife, and to tell Court to appoint him, Mr. Stephen J. O'Brien, which appellant did, requesting same for his wife. Thereupon, Mr. O'Brien gave the Court a letter from a Mr. Louis Craven, not Haven, attorney at law, in Salt Lake City, Utah, addressed to said John Dore, Esq., of Seattle, Washington, requesting him to handle the case. Mr. O'Brien clearly and distinctly told the Court that John Dore had asked him to appear in Court for him, for reason that John Dore had a case in state Court at Bellingham, Washington, and could not be there that day. Mr. O'Brien further informed trial Court that the letter from Mr. Craven, of Salt Lake City, requested Mr. Dore to defend Margaret E. Waley, which trial Court acknowledged. A great deal of the discussion regarding the letter between the Court and Stephen J. O'Brien, Esq., does not appear on the record, e.g., they had an extremely

hard job making out the name signed to the letter; and, Mr. Stephen J. O'Brien most certaintly did not tell Court that said Louis Craven was of John Dore's office in Seattle. Record hereinabove noted, as to June 20, 1935, is entirely in error, no doubt but purposely falsified to keep appellant railroaded into prison without proper trial by jury upon an offense he did not commit.

Now as to trial Court record sent up herein as to June 21, 1935, the record is not in proper sequence of events, viz., after taking pleas of guilty from appellant and Margaret E. Waley, Court next asked if appellant had anything to say before sentence was passed. The appellant then said, "All I have to say is for my wife, if I can say that." The Court allowed such statement. Next, Mr. O'Brien stepped in with the statement beginning, "With reference to Mrs. Waley * * *" Again, the Court distinctly, of each defendant, requested a plea to count one, then as to count two, of the indictment. Finally, the Court did not ask Mr. O'Brien the first two questions, which are listed by the record herein, such was not mentioned by trial Court at all. The trial Court asked Mr. O'Brien if he had conferred with the defendants; and, if he, Mr. O'Brien, was ready to proceed with the case. No such questions were asked as the record discloses, if defendants understood that he was appointed as counsel, or whether *"they"* accepted him, Mr. O'Brien, as counsel, etc. Except for a single change of the words *"her"* and *"she"* to *"them"* and *"they"*, the record is true as to the following:

"Mr. O'Brien. I have advised my client and she desires to plead guilty to the charge.

The Court. I will not sentence on a plea qualified by any such statement.

Mr. O'Brien. Mr. Waley says it has been explained to him and to Mrs. Waley that she was guilty of conspiracy under this Act. I have advised with *her,* Your Honor, and *she* still desires to plead guilty."

(Appellant has substituted *"her"* and *"she"* for *"them"* and *"they",* to give the true statement made by trial Court in re the above.) Now just following the above is a statement of the trial Court which goes to prove the record herein, so called, is not in proper sequence of events, to wit:

"The Court. On your statement *as well as that statement just made,* sentence will not be pronounced." (Emphasis supplied.)

The *"statement just made"* referred to by the Court was appellant's plea in behalf of his wife, which was made just prior to the foregoing.

Contrary to decision in *Waley v. Johnston,* 139 F. (2d) 117, appellant did not have aid of counsel. Mr. Stephen J. O'Brien was counsel for Margaret E. Waley, as agent for John Dore of Seattle, and not counsel for appellant. Mr. O'Brien did not act for, nor advise appellant, in any way, but concentrated upon defense of Margaret E. Waley, in talking to appellant. Further, the appellant has never had a hearing regarding whether or not he had counsel,

most certainly not in the District Court upon which this Circuit Court based above opinion, which is not according to fact. The appellant has been under impression that a conspiracy exists in the United States Courts to prevent him from proper trial, etc., but in view of this record, which he has carefully examined, appellant desires to apologize to this Honorable Court for evil thoughts of them. Apparently the record has been deliberately made a fallacy, or twisted, by the trial Court in order to keep appellant railroaded into prison for an offense he did not commit without fair jury trial and without aid of counsel, because the trial Court knows full well they have no evidence of the appellant's guilt in the charge, and never produced any evidence of interstate transportation of a kidnapped person in the trial of the defendant Margaret E. Waley, and can't produce any now.

Trial Court did not advise appellant as to his right of jury trial, nor to the effects of pleas of guilty and not guilty, prior to his entering plea, as commonly done by Courts; and, appellant was a very young, ignorant person with no knowledge of law, and without advice. Trial Court record, so called, fails to show that Court found appellant's plea was entered intelligently, understandingly, and voluntarily, and that appellant knew that he had right to be heard by jury in the case instead of by arbitrary action of the trial Court. Yet the Court knew full well appellant was subjected to a grave and serious charge, and stated as much on their so-called record.

QUESTIONS PRESENTED.

1. Was Stephen J. O'Brien acting for John Dore, Esq., in defense of Margaret E. Waley; and, if so, wasn't appellant deprived of counsel to advise and defend him?

2. In order to waive his right of trial by jury, is it not essential for appellant to have so done competently and intelligently; and, is not a waiver an intelligent relinquishment of a known right?

3. Does a plea of guilty waive the fundamental right of trial by jury, or is not that right a separate and distinct thing from such judicial confession?

4. Does not the Act of Congress of June 22, 1932, as amended March 18, 1934, Section 408(a) and 408(b), require a trial by jury in order to determine whether the death penalty shall apply and be inflicted?

5. Isn't a plea of guilty a judicial confession; and, doesn't the law require the *corpus delicti* of interstate transportation of a kidnapped person receive corroboration from a source outside of the person making such confession in order to prevent injustice in convicting insane or innocent persons, or does the law just allow anyone to run down and confess to anything in order to keep the jails filled?

6. Since the Supreme Court has denoted 28 U.S.C.A. 2255 to be similar to and more than a writ of habeas corpus, is it required that there be hearings on matters of fact?

ARGUMENT AND AUTHORITIES.

1. WAS STEPHEN J. O'BRIEN ACTING FOR JOHN DORE, ESQ., IN DEFENSE OF MARGARET E. WALEY; AND, IF SO, WAS NOT APPELLANT DEPRIVED OF COUNSEL TO ADVISE AND DEFEND HIM?

While they say, in *Johnson v. Zerbst,* 304 U.S. 458, 82 L.Ed. 1461, 146 A.L.R. 357, that any right, trial by jury, or of counsel, guaranteed defendant under the United States Constitution has been abridged the trial Court has no jurisdiction to adjudge guilt nor to issue a judgment. And that a defendant has the right of undivided and effective aid of any counsel appointed where, as here, there are two separate and distinct defenses to be prepared. *Taylor v. U. S.,* 226 F. (2d) 337; *Wright v. Johnston,* 77 Fed. Supp. 687; *Glasser v. U. S.,* 315 U.S. 60, 62 Sup. Ct. 457.

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2. IN ORDER TO WAIVE HIS RIGHT OF TRIAL BY JURY IS IT NOT ESSENTIAL FOR APPELLANT TO HAVE SO DONE COMPETENTLY AND INTELLIGENTLY; AND, IS NOT A WAIVER AN INTELLIGENT RELINQUISHMENT OF A KNOWN RIGHT?

A defendant in a criminal action is entitled to a trial by jury as a matter of right. United States Constitution, Amendment 6; United States Constitution, Article III, Section 2, Clause 3; *Callan v. Wilson,* 127 U.S. 540, 547, 32 L.Ed. 223.

A waiver is an intentional giving up of a right known; if, as here, a defendant didn't know such existed as a matter of right there could be no waiver. See, *Johnson v. Zerbst, supra.*

According to all authorities, there must be an oral or written waiver of right of trial by jury. Fed. Crim. Proc., Rule 23(a); Amer. Law Inst. Code Crim. Proc. (1930), Section 266; *U. S. v. Harrison,* 23 Fed. Supp. 249, aff'g 99 F. (2d) 1017; *Jabozynski v. U. S.,* 53 F. (2d) 1014; *U. S. v. Steese,* 144 F. (2d) 432; *Bardwell v. Hiatt,* 50 Fed. Supp. 913; *Freeman v. U. S.,* 227 Fed. 732, 742, 744; *Dillingham v. U. S.,* 76 F. (2d) 36, 39; *Brown v. Zerbst,* 99 F. (2d) 745; *Ex parte Danziger,* 77 Fed. Supp. 466.

No right of jury was explained appellant by trial Court, nor effect of pleas as to such, and no inquiry was made if the plea was his and voluntary. See, *Patton v. U. S.,* 281 U.S. 276, 298-299, 312-313, 74 L. Ed. 854.

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3. **DOES A PLEA OF GUILTY WAIVE THE FUNDAMENTAL RIGHT OF TRIAL BY JURY, OR IS NOT THAT RIGHT A SEPARATE AND DISTINCT THING FROM SUCH JUDICIAL CONFESSION?**

Herein appellant refers Court to (2) above, and cases cited, also.

A plea of guilty does not waive any fundamental or constitutional right held by a defendant, so it is held by: *Adams v. U. S.,* 126 F. (2d) 744-776; *Adams v. U. S.,* 63 Sup. Ct. 236; *Von Moltke v. Gillies,* 332 U.S. 708; *U. S. v. Chase,* 135 U.S. 255, 34 L. Ed. 117; *Dunbar v. U. S.,* 156 U.S. 185, 39 L.Ed. 390; *Holmgren v. U. S.,* 217 U.S. 509, 54 L.Ed. 861; *Harris v. U. S.,* 277 U.S. 340, 57 L.Ed. 534; *Johnson v. Zerbst, supra.*

On motion herein appellant withdrew his plea of guilty, which is permissible after conviction where manifest injustice exists. Fed. Crim. Proc. (18 U.S.C.A.), Rule 32(d); also, *Kercheval v. U. S.*, 274 U.S. 224.

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4. **DOES NOT THE ACT OF CONGRESS OF JUNE 22, 1932, AS AMENDED MARCH 18, 1934, SECTION 408(a) AND 408(b), REQUIRE A TRIAL BY JURY IN ORDER TO DETERMINE WHETHER THE DEATH PENALTY SHALL APPLY AND BE INFLICTED?**

This Act states that a person "shall upon conviction, be punished (1) by death if the verdict of the jury shall so recommend * * * (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment * * *."

The words *"shall"* make it mandatory that a death penalty be imposed if the jury so says, which is impossible to perform, where, as here, there was no jury allowed the defendant. See any standard law dictionary and cases there cited as to the mandatory nature of the word *"shall"* when so used.

5. IS NOT A PLEA OF GUILTY A JUDICIAL CONFESSION; AND, DOES NOT THE LAW REQUIRE THE CORPUS DELICTI OF INTERSTATE TRANSPORTATION OF A KIDNAPPED PERSON RECEIVE CORROBORATION FROM A SOURCE OUTSIDE OF THE PERSON MAKING SUCH CONFESSION IN ORDER TO PREVENT INJUSTICE IN CONVICTING INNOCENT PERSONS, OR DOES THE LAW JUST ALLOW ANYONE TO RUN DOWN AND CONFESS TO ANYTHING IN ORDER TO KEEP THE JAILS FILLED?

No evidence was given as to the *corpus delicti* from an outside source, nor to the grand jury, nor does the government possess any such evidence at all, and none was introduced in the trial of the codefendant Margaret E. Waley, whom the trial Court railroaded into prison instead of dismissing the case for lack of evidence; but, in order to be in position to railroad this nineteen year old girl into prison the trial Court just had to railroad appellant so that no questions would be asked. The law, so says these Courts, requires such corroboration. *Litkopsky v. U. S.,* 9 F. (2d) 844; *Daeche v. U. S.,* 250 Fed. 566, 571, 162 C.C.A. 582, 587; *Mangum v. U. S.,* 289 Fed. 213, 216; *Goff v. U. S.,* 257 Fed. 294; *Rosenfeld v. U. S.,* 202 Fed. 469; *Naftzger v. U. S.,* 200 Fed. 494; *Flowers v. U. S.,* 116 Fed. 241.

Appellant has several times brought this question up to this Court on *habeas corpus* proceedings, and this Court has ignored same as unworthy of deciding. Appellant requests same to be decided.

6. SINCE THE SUPREME COURT HAS DENOTED, 28 U.S.C.A. 2255, TO BE SIMILAR TO AND MORE THAN A WRIT OF HABEAS CORPUS, IS IT REQUIRED THAT THERE BE HEARINGS ON MATTERS OF FACT?

In the motion presented trial Court held no hearing, but issued its order denying the motion, which raised matters of fact, upon the record, so called, alone. The record itself is neither correct nor in proper sequence of events.

The Supreme Court, in *Waley v. Johnston,* 316 U.S. 101, 86 L.Ed. 1302, and *U. S. v. Hayman,* 342 U.S. 205, 96 L.Ed. 232, declares that where, as here, a petition raises matters of fact, petitioner is entitled to a prompt hearing at which he is present.

CONCLUSION.

For the each and every reason set forth above appellant contends the decision of the trial Court should be reversed, and a fair and impartial trial by jury be afforded appellant.

Dated, December 14, 1955.

HARMON M. WALEY,
Appellant Pro Se.